Supreme Court, U.S.
FILED
JUL 13 1994
OFFICE OF THE CLERK

No. 93-1997

In the
Supreme Court of the United States
October Term, 1993

GOLDEN VALLEY
LUTHERAN COLLEGE, and
LUTHERAN BIBLE INSTITUTE
OF MINNEAPOLIS,

Petitioners,

v.

CITY OF GOLDEN VALLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

A. Whether summary judgment dismissing Petitioners' claim of a categorical taking of property was proper where Petitioners failed to produce evidence that a temporary municipal building moratorium denied Petitioners all beneficial use of their property.

B. Whether summary judgment dismissing Petitioners' claim of a taking of property was proper where there is no evidence that Respondent's actions had any negative economic impact whatsoever on Petitioners.

C. Whether Petitioners' motion to remove the trial judge because her former brother-in-law was a witness raises any colorable federal issue.

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Respondent City of Golden Valley (the "City") hereby files this Response to the Petition of Golden Valley Lutheran College and Lutheran Bible Institute of Minneapolis (jointly, the "College") for a Writ of Certiorari to review the March 15, 1994 decision of the Minnesota Supreme Court not to review the January 25, 1994 decision of the Minnesota Court of Appeals affirming the trial court's summary judgment in favor of the City.

CONSTITUTIONAL PROVISIONS

The only constitutional provision involved in this appeal is the Fifth Amendment to the United States Constitution, which provides that private property shall not "be taken for public use, without just compensation."

COUNTERSTATEMENT OF THE CASE

The City adopts the statement of facts contained in the trial court's June 7, 1993 Memorandum. *See* Petition for Writ of Certiorari (the "Petition"), pp. F3-F6. The trial court's judgment was affirmed in a January 25, 1994 Minnesota Court of Appeals decision. The Minnesota Supreme Court denied discretionary review of the Minnesota Court of Appeals decision on March 15, 1994.

SUMMARY OF THE ARGUMENT

The College's Petition for a Writ of Certiorari to the Minnesota Supreme Court should be denied. The College failed to support its "taking" claim with evidence that the temporary building moratorium enacted by the City deprived the College of all beneficial use of its property, nor did it introduce any evidence that the moratorium had a negative economic impact on the College. Finally, its attempt to remove the trial judge does not raise any federal issue and was transparently dilatory, given that the College had participated in discovery before the same judge for 16 months before bringing its untimely motion.

REASONS THE WRIT SHOULD BE DENIED

A. *There Is No Evidence Of A Categorical "Taking."*

The Minnesota Court of Appeals correctly found that the College presented no evidence of a taking by the City under either of two "taking" standards. In order to avoid summary judgment under the "categorical takings" doctrine, the College must come forward with some evidence that the City deprived the College of "all economically beneficial use" of its land. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992); *see also LeBlanc v. State, Through Dept. of Transp. and Development*, 626 So. 2d 1151 (La. 1993), *cert. denied*, ____ U.S. ____ (June 22, 1994) (highway construction that restricted access to property for seven months did not amount to a "taking"). The record shows that the College could have sold its property to at least two potential purchasers during the moratorium imposed by the City, a fact which makes any claim of a "categorical taking" ludicrous. Even if the College had lost all economically beneficial use of its property during the moratorium, beneficial uses existed after the moratorium expired.

More importantly, the College was legally free to continue to use its property for its existing, approved use as a college (even though it had run out of money and was *financially* unable to continue that use). The City cannot be held responsible for the College's precarious financial condition at the time of the moratorium.

B. *There Is No Evidence That The City's Actions Had Any Negative Economic Impact On The College.*

Under the *Penn Central* balancing test, the Court considers, *inter alia*, the economic impact of the

regulation on the landowner. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The record contains no evidence whatsoever that the moratorium had a negative economic impact on the College. In fact, foreclosure had begun on the College's mortgage *two years before* the moratorium took effect. The College simply failed to present evidence tying any of the College's financial problems to any act by the City. The Minnesota Court of Appeals, therefore, correctly affirmed the trial court's decision granting summary judgment to the City.

C. *The College's Motion To Remove The Trial Judge Was Untimely.*

The College contends that the trial judge should have recused herself from this action because her husband's brother was a likely witness. Rather than avail itself of the procedure for removal of a judge set forth in Minnesota Rule of Civil Procedure 63.03, however, the College based its two ill-timed removal motions on Minnesota's Code of Judicial Conduct. Its first such motion was brought in April 1991, over one year after the trial court's order dismissing the complaint. After the Minnesota Court of Appeals remanded the case to the trial court in December 1991, the College completed all discovery before the trial judge and waited *over 16 months*, until April 23, 1993, to renew its motion to remove. By that time, the trial judge's husband had died and there was no longer any family relationship on which to base the removal motion.

As both the chief judge of the district and the Court of Appeals noted, the College's delay "suggests . . . that the removal motion was brought to delay the trial or harass the city, rather than from a genuine concern for bias." Petition, pp. E5, I7. This matter does not raise any federal constitutional issue.

CONCLUSION

The College's Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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Dated: July 13, 1994.